The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Midland Brake, Inc.

File: B-225682

Date: June 3, 1987

DIGEST

1. There is no basis to question an agency's decision to reject a technically unacceptable proposal rather than conduct discussions where the contracting officer properly concluded that the proposal was not capable of being made acceptable through discussions.

2. Protest that contracting officer should have considered protester's alternate proposal is denied because the solicitation did not permit consideration of alternate offers.

DECISION

Midland Brake, Inc., protests the rejection of its offer and the subsequent award of a contract to Jerry M. Lewis Truck Parts and Equipment, Inc. under request for proposals (RFP) No. DLA700-86-R-3857 issued by the Defense Logistics Agency, Defense Construction Supply Center (DCSC). We deny the protest.

The RFP, issued on August 22, 1986, contemplated a requirements-type contract for the supply of hydraulic brake master cylinder assemblies for use on 5-ton trucks as identified by National Stock Number (NSN) 2530-00-741-1070. The RFP's item description specified that the cylinder assemblies were to be produced in accordance with drawing No. 19207 74-11070TDP, dated May 21, 1985. DLA asserts, and Midland does not dispute, that this is a complete technical data package adequate for the preparation of competitive offers.

On September 23, 1986, DCSC issued amendment No. 0001 to the solicitation to revise the total estimated quantity of assemblies, add a fourth ordering range and to extend the due date for receipt of offers to October 16. Four offers, including Midland's, were received by October 16. Discussions were then held with all four offerors; with respect to Midland, they centered on the firm's failure to acknowledge receipt of amendment No. 0001. On October 23,

amendment No. 0002 was issued for the purpose of providing all offerors an opportunity to verify or, if possible, improve their price or delivery terms. Revised offers were due by November 6. Midland hand-carried amendment Nos. 0001 and 0002 to DCSC prior to that date.

Not noticed by the contracting officer at this time was the fact that on the third of amendment No. 0001's six pages and on the second of amendment No. 0002's four pages, Midland had typed in an empty space between other existing typewritten lines of text "We quote our part number 2951."

Subsequent to the receipt of BAFOs on November 6, DLA realized that the addition of the fourth ordering range conflicted with another solicitation provision concerning the maximum delivery order quantity a contractor would be obligated to furnish. This was corrected by the issuance of amendment No. 0003, which deleted the fourth ordering range and called for the submission of revised offers by January 6, 1987. The due date was moved forward to December 19, 1986, by amendment No. 0004 because DLA determined there was an urgent need for these supplies. Midland made no reference to its part number 2951 in its acknowledgment of receipt of either of these amendments. Only three offerors submitted BAFOs; Midland and Jerry M. Lewis were the low and second low offerors, respectively.

Although Midland was the low offeror, before any award was made to it the contracting officer discovered the references in Midland's proposal to the firm's commercial brake master cylinder assemblies. As a result of telephone inquiries, the contracting officer learned that Midland was offering its part in accordance with its request for deviation submitted under a prior contract (DLA700-86-C-4202) Midland has with DCSC for the same requirements.

According to DCSC's memoranda of these telephone conversations, at this point the contracting officer considered Midland to be "aware that [it] is in non-compliance with specifications and therefore will be determined technically unacceptable." Nevertheless, the contracting officer called Midland again on January 15, 1987, "to verify that Contractor is offering his P/N 2951 and the item will require deviation to be completely [in accordance with the specifications.]" Midland was asked to confirm this in writing, which it did by letter of January 16.

In the meantime, the contracting officer checked on the supply status of the item being purchased and the status of Midland's request for deviations under its existing contract. She was advised that there was an urgent need for these items, over 13,000 of which were backordered; that the

deviations from the specification requirements which Midland had requested under its prior contract had not yet been approved and would require approximately 60 days for the engineering support activity for this item, the Army Tank Automotive Command (TACOM) to evaluate; and that even if the requested deviations were approved, Midland's product would then have to undergo First Article Testing, which only Jerry M. Lewis had passed. The contracting officer then awarded the contract to Jerry M. Lewis as the low, technically acceptable offeror after concluding that Midland was offering a nonconforming part under the subject RFP and in view of the urgent need for the master cylinder assemblies. Upon receiving notice of award to another, Midland filed an agency level protest by letter dated January 25, 1987, and with our Office by letter of January 30.

In its initial protest, Midland contends that the rejection of its offer as technically unacceptable resulted from the agency's failure to conduct meaningful discussions with it. It also asserts that the award to Jerry M. Lewis is contrary to the policy mandated by the Competition in Contracting Act (CICA) of 1984, that agencies promote the use of commercial products. See CICA, 10 U.S.C. § 2301 (Supp. III, 1985).

Midland notes that in none of the discussions it had with DCSC during the course of this procurement prior to December 1986 was the acceptability of its commercial part mentioned. It attributes this to TACOM having "deemed" Midland's commercial part to be the technical equivalent of the part specified in the RFP's technical drawing package. The protester also points out that DCSC did not "object" when Midland confirmed that it was offering its commercial part. Midland argues that no meaningful discussions were held because the agency did not specifically advise Midland that its part was considered technically unacceptable. The protester asserts that it was thereby deprived by the agency of an opportunity to submit a proposal which would have addressed DCSC's concerns.

Here, DCSC solicited offers for the supply of an item to be built in accordance with a complete government technical drawing package. The only indication in Midland's initial offer and the copies of four solicitation amendments which it returned which would indicate Midland's intent to supply its own commercial part and not the item described in the RFP were notations inserted in two of the amendments in such an inconspicuous manner that they were almost overlooked in the evaluation and award process. This circumstance, we believe, is what resulted in the agency's failure to discuss this matter with Midland early on in the procurement. When queried by the agency, Midland confirmed that its intent was to supply its own commercial part. Although under an

existing contract for the supply of the same item as here Midland had requested deviations from the specifications which would permit it to substitute its commercial product for the part specified, at the time of the evaluation of proposals and award of this contract the requested deviations had not been approved and Midland had not been authorized to furnish its commercial part in satisfaction of the earlier contract.

Under these circumstances, we find no merit in Midland's assertion that the agency failed to conduct meaningful discussions. It is true that discussions, whether written or oral, are a fundamental requirement of negotiated procurements and must be held with all responsible offerors whose proposals are within the competitive range. Price Waterhouse, 65 Comp. Gen. 205 (1986), 86-1 C.P.D. ¶ 54. This requirement includes advising offerors of deficiencies in their proposals and affording them the opportunity to satisfy the government's requirements through the submission of a revised proposal. Furuno U.S.A., Inc., B-221814, Apr. 4, 1986, 86-1 C.P.D. ¶ 400. Thus, it is well settled that competitive range discussions must be "meaningful" in nature--that is, agencies must point out weaknesses, deficiencies, or excesses in proposals unless doing so would result in technical leveling or technical transfusion. Price Waterhouse, 65 Comp. Gen. 205, supra.

The record in this case belies Midland's assertion that DCSC was obligated to discuss the technical unacceptability of its master cylinder assembly because the agency concluded that Midland's proposal was technically unacceptable and was no longer within the competitive range. The agency reports, and Midland does not dispute, that Midland's proposal did not clearly indicate that it was offering its commercial 5-ton master cylinder assemblies. Further, it is DCSC's position that the firm failed to provide sufficient information in its proposal to establish the acceptability of its commercial product or indicate how it proposed to modify its product to meet the specification requirements.

According to the agency, Midland has filed 52 requests for deviation from the mandatory design specifications under its existing contract No. DLA700-86-C-4202 so that it could provide its commercial product. Although Midland alleges that "from a technical stand-point, all of the deviations were accepted" DCSC reports that the request for deviations is still pending under that contract.

Nevertheless, the protester asserts that the agency was obligated to conduct further discussions with regard to its proposed commercial product so as to provide Midland with an

opportunity to revise its proposal to satisfy the solicitation requirements. We note, however, that Midland has never represented that it was willing to provide a product other than its commercial master cylinder assembly. In view of this, the agency takes the position that further discussions would have served no useful purpose because Midland's proposed product would not meet the government's needs and the items were urgently needed.

We find that DCSC was not required to conduct further discussions with Midland once it ascertained that the firm's proposal was for its commercial product--which Midland concedes does not conform to the technical requirements--since agencies need not hold discussions with offerors of proposals that are not technically susceptible of being made acceptable through discussions. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.609(a) (1986); Fairchild Weston Systems, Inc., B-218470, July 11, 1985, 85-2 C.P.D. ¶ 39. Here, the agency properly concluded that Midland's proposal was not capable of being made acceptable through discussions because, as the agency reports, the design specification contained in this RFP is the most complete technical data package which reflects the government's minimum needs for this item and Midland has not shown that this requirement is unreasonable. Basically, Midland has simply argued that although its proposed master cylinder assembly does not "exactly meet the stated specifications" it allegedly meets or exceeds the agency's performance needs. Midland argues that based on a prior course of dealing with procurement officials at DCSC, it offered to supply its own commercial cylinder which is the identical cylinder it seeks to provide under its existing contract with DCSC.

We note that to the extent Midland is alleging that the contracting officer should have accepted its alternate proposal based on a prior course of dealing it is a well established principle in government contracts that each procurement is a separate transaction and the acceptability of a proposal depends upon the facts and circumstances of that particular procurement and not upon prior procurements. Alfa-Laval, Inc., B-221620, May 15, 1986, 86-1 C.P.D. ¶ 464 at 4. Furthermore, an agency must evaluate proposals only on the basis of the factors and requirements specified in the solicitation in response to which they were submitted. Cardkey Systems, B-220660, Feb. 11, 1986, 86-1 C.P.D. ¶ 154. Thus, even if the requested deviations under Midland's prior contract were approved, that approval cannot be carried over to this procurement because those deviations were not incorporated into this RFP.

Midland further contends that its proposed commercial master cylinder constitutes an alternate offer which meets or exceeds the government's needs at a lower price than Jerry M. Lewis. Therefore, Midland argues that since the RFP did not prohibit alternate offers, its alternate proposal should have been considered by DCSC. In response, the agency states that contrary to the protester's assertions, the RFP does prohibit consideration of alternate offers. DCSC states that the solicitation incorporates by reference section 52.215-13 of the FAR, which states in pertinent part that "offers for supplies or services other than those specified will not be considered unless authorized by the solicitation." FAR, 48 C.F.R. § 52.215-13(d) (1986). However, Midland contends that paragraph L08 of the solicitation, entitled "Alternate Offers," advises prospective offerors that alternate proposals could be submitted.

We disagree. The specific language of paragraph L08 makes it clear, as the agency argues, that it is not for use in negotiated procurements--only for sealed bid solicitations. Section "L" of the instant solicitation contains various provisions of the FAR which are applicable to both sealed bid and negotiated solicitations. We note, however, that FAR, § 52.214-12 cited in paragraph L08 "Alternate Offers" is identified in paragraph L01(a) as a provision applicable to sealed bid solicitations. In our view, the two provisions, when read together in context, make it clear that paragraph L08 was intended for use in sealed bid solicitations. Accordingly, the contracting officer was not permitted to consider any alternate proposals.

Finally, we need not address Midland's allegation that DCSC ignored the CICA mandated policy to procure commercially available parts since in its comments on the agency report Midland does not rebut DCSC's arguments on this issue. We therefore consider this issue to have been abandoned.

Midland requested that it be awarded attorney's fees and the costs of pursuing the protest. However, recovery of costs is allowed only where a protest is found to have merit. 31 U.S.C. § 3554(c)(1) (Supp. III, 1985); 4 C.F.R. § 21.6(d) (1986). Since we have denied the protest, we also deny Midland's claim for costs.

Protest denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel